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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 588

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
APPELLANTS

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.,
APPELLEES

No. 589

INTERSTATE COMMERCE COMMISSION, APPELLANT

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.,
APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, the appellees noted in the margin *

* American Sand and Gravel Company; Columbus Gravel Company; Crystal Springs Sand and Gravel Company; Gatesville Sand and Gravel Company; Green Brothers Gravel Company; and Hammett Gravel Company, all of whom are shippers of sand and gravel; and Masonite Corporation and The Flintkote Company, who are shippers of pulpwood.

move that the judgment of the District Court be affirmed on the ground that the questions raised by appellants are so insubstantial as not to warrant further argument.

STATEMENT OF THE CASE

These are direct appeals from a judgment of a statutory three-judge District Court entered October 12, 1954, pursuant to 49 U. S. C. § 17 (9) and 28 U. S. C. §§ 2321-25 which set aside, annulled and permanently enjoined the enforcement of an order of the Interstate Commerce Commission entered pursuant to investigation under Section 13 (4) of the Interstate Commerce Act, 49 U. S. C. § 13 (4), in a proceeding entitled *Mississippi Intrastate Freight Rates and Charges,* 291 I.C.C. 39.

The Interstate Commerce Commission in 1952 granted the most recent of several general freight increases on interstate traffic in a proceeding commonly known as Ex Parte 175. *Increased Freight Rates, 1951,* 284 I.C.C. 589. Following the decision in Ex Parte 175, the Mississippi Public Service Commission, on petition of the railroads operating in Mississippi, and after full hearings, granted similar increases on all Mississippi intrastate traffic, with the exception of certain specified commodities. On some of the commodities, the Mississippi Commission authorized an increase, but in an amount less than that authorized by the Interstate Commerce Commission on interstate rates; on two of the commodities it authorized no increase.[1] Thereafter the railroads, proceeding under Section 13 (4) of the Interstate Commerce Act, petitioned the Interstate Commerce Commission to authorize an in-

[1] The details are set out in the Statement as to Jurisdiction (No. 589, pp. 7-8).

crease in the Mississippi intrastate rates to the full extent authorized in Ex Parte 175 on interstate rates. The Commission, after a hearing, found that the Mississippi intrastate freight rates on these "excepted commodities" caused undue, unreasonable and unjust discrimination against interstate commerce, and ordered them to be increased to the level of interstate rates. 291 I.C.C. 39.

The Mississippi Public Service Commission filed a petition for review of the order in the District Court. Interested shippers and railroads intervened as plaintiffs and defendants, respectively. The District Court, after full briefs and arguments, concluded that the order of the Commission was not supported by substantial evidence, and directed judgment accordingly. *Mississippi Public Service Commission* v. *United States*, 124 F. Supp. 809. One judge dissented.

ARGUMENT

The decision of the District Court does not present any question of substance warranting further argument in this Court. Appellants seek to have this Court determine issues of fact by detailed review of a voluminous record. This the District Court has done, with obvious care, and with full appreciation of the standards of review laid down by this Court. Affirmance of the decision below will be fully consistent with the prior decisions of this Court.

I

APPELLANTS SEEK A RE-REVIEW OF THE EVIDENCE

The District Court stated (124 F. Supp. at 813): "The paramount question for determination is whether or not there was substantial evidence to support the finding of the Commission." That question the Dis-

trict Court answered in the negative. Appellants, of course, disagree, and ask this Court to re-examine the record to determine whether the District Court was correct.

This Court has indicated clearly its attitude toward such requests. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. In that case the Court spelled out the proper standard of review of administrative orders, and then continued (340 U. S. at pp. 490-491):

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."[2]

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[2] See also National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498; Radio Corporation of America v. United States, 341 U.S. 412. In National Labor Relations Board v. American National Insurance Co., 343 U.S. 395, the Court reaffirmed (at p. 410) its prior statement that "This Court 'is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way or the other, though fair-minded judges could find it tilting either way.'" The Court also noted that the rule had special application to cases where "a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case"—a statement equally applicable to the statutory standard in Section 13 (4) of the Act: "undue, unreasonable or unjust discrimination against interstate or foreign commerce".

Examination of the opinion below shows that the District Court neither misapprehended nor misapplied the standard of review established by this Court in the *Universal Camera* case.

In the *Universal Camera* case this Court (making it clear that it was speaking of the standards set by the Administrative Procedure Act generally as well as by the Labor Management Relations Act, see 340 U.S. at pp. 487, 490) emphasized the responsibility of a court called upon to enforce or set aside an administrative order. "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function." 340 U.S. at 490. What the reviewing court should do was clearly set forth (*id.* at 487-488):

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight . . . Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

The District Court opinion demonstrates that the court was proceeding in the light of the *Universal Camera* case and fully understood the standards which it established. The District Court said (124 F. Supp. at p. 814):

> "The Court in reviewing an order of the Interstate Commerce Commission has the duty to study the entire record and it is the function of the Court to determine from the whole record whether or not there was substantial evidence before the Commission upon which its order could be based. If there were no substantial evidence then it is the duty of the Court to set aside such order and enjoin its enforcement. Congress in enacting in 1946 the Administrative Procedure Act made it mandatory that the reviewing court should set aside an order that was unsupported by substantial evidence and that it should review the whole record in making the determination. The Supreme Court of the United States in Universal Camera Corporation vs. N.L.R.B., 340 U.S. 474, held that in determining what is substantial evidence that the Court must take into consideration whatever in the record fairly detracts from its weight. Under the decision in that case it is the duty of the reviewing court when it cannot conscientiously find that the evidence supporting the order of the Commission is substantial, when viewed in the light that the record in its entirety furnishes, including the body of the evidence opposed to the Board's view, to set aside the order of the Commission."

The court correctly added (*id.*, p. 815) that it "does not have the power to settle disputes in the testimony,

but it must consider the entire record and determine as a matter of law if there was substantial evidence to support the order."[3]

Not only did the court correctly apprehend its duty and function, but it also properly discharged them. The case was under advisement by the District Court for nearly four and one half months. The judge who wrote the opinion for the majority was the same judge who denied appellees' request for a temporary restraining order at the outset of the case—a change of attitude which could result only from a study of the whole record. The opinion bears evidence of the care with which it was prepared.

Appellants refer to several sentences in the opinion below which, they say, show that the District Court "misapprehended or grossly misapplied" the rule of the *Universal Camera* case. When the sentences are read in context, they show quite the contrary, and suggest, rather, that it is with appellants, and not with the court below, that the misapprehension lies. Thus, in criticizing the court for "weighing the evidence" (Statement as to Jurisdiction No. 589, pp. 13-14), appellants refer to the testimony of experts who predicted increased *revenue* from increased *rates,* and quote the court's statement that their testimony is exceedingly weak, but omit the next two sentences which explain what the court meant. The Statement also quotes the statement that "their testimony has been fully weighed" but omits the next clause in the sentence

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[3] There may be room for doubt that the dissenting judge below, who did not refer to the Universal Camera case, but relied for his principles of review on the 1912 decision of this Court in Interstate Commerce Commission v. Union Pacific R.R. Co., 222 U.S. 541, correctly apprehended the function and duty of a reviewing court.

stating how it was weighed.[4] The District Court actually said (124 F. Supp. at p. 816):

> "The Interstate Commerce Commission found that the increase granted in the rates by it would produce more than $550,000 annually on all of the commodities involved. This finding was based upon estimates made by experts of the railroad companies that such revenue would be produced if the rate increase is given. The testimony upon this proposition is exceedingly weak. *It is based upon the presumption that the same amount of freight traffic would continue under the increased rate as had theretofore been carried at the lower rate. This assumption and opinion is contrary to the sworn testimony of those who were in position not only to know but also to control large quantities of the products upon which the rate was increased.* The evidence to support this finding when weighed in the light of the prevailing rule of law is not sufficient to amount to substantial evidence.
>
> "The testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests has not been overlooked but their testimony has been fully

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[4] It appears that appellants regard the court's use of the word "weigh" as proof of its error. In fact, one cannot determine whether evidence is substantial, even when it stands alone, without "weighing" it in the sense in which the word was used by the District Court, and certainly one cannot determine whether evidence is substantial "on the record as a whole" without "weighing" it, in that same sense. As this Court said in the Universal Camera case (340 U.S. at p. 488): "The substantiality of evidence must take into account whatever in the record fairly detracts from its *weight*". (Italics supplied.)

> weighed *in the light of the entire record and proceedings in this cause and when viewed in this light* the testimony fails to show substantiality sufficient to uphold the order here under attack and the findings that were made by the Interstate Commerce Commission. It would unduly prolong this opinion to undertake to point out in detail the testimony of the various witnesses and the things that detract from the substantiality of the evidence, but it is demonstrated more closely with reference to sand and gravel, the pulpwood and the fertilizer and cement that is involved." (Italics supplied.)

The District Court was applying the rule announced in *Florida* v. *United States,* 282 U.S. 194— that it is essential in a Section 13 (4) proceeding to show that the requested increase in freight rates will result in increases in revenue. Moreover, it correctly described the evidence. Detailing all of the facts would unduly extend this Motion, but with respect to sand and gravel, for example—one of the commodities on which the Mississippi Commission authorized no increase in intrastate rates—the finding by the Interstate Commerce Commission of increased revenue was based on a simple multiplication of the amount of the increase per ton in rates by the tonnage carried the previous year at the lower rate, accompanied by the assertion, admittedly not based on knowledge of conditions in Mississippi, that an increase in rail rates would cause no diversion of shipments to trucks (Tr. pp. 35-37, 41-42, 100, 241-243, 277, 333). The record as a whole, however, contains overwhelming evidence that the rate increase would mean a revenue *decrease*. The facts with regard to Mississippi geography, the sand and gravel competitive market conditions in Mississippi,

and the history of Mississippi sand and gravel rates, all of which show marked divergence from any national pattern, are fully set out.[5] There is specific evidence, backed up by complete analysis of these facts, that a rate increase will result in the diversion of enough present rail movements to trucks that the total rail revenue will decrease, contained in the testimony and exhibits of the rate expert for the Mississippi Public Service Commission, who was thoroughly acquainted with Mississippi conditions. There is unqualified testimony to the same effect by four major intrastate rail shippers of sand and gravel in Mississippi—the men who decide what mode of transportation will be used. See Tr. 231-236, 464, 466-474, 648-681, 699-720, 742-751; Green Dep. pp. 207, 10-19, 21-23, 38, 45; Exhs. 73, 104, 107. Full discussion of the testimony and exhibits on this and other commodities would take many pages; suffice it to say that the District Court was fully warranted in characterizing the assumptions on which the Commission's finding was grounded as "weak" and in concluding, on the record as a whole, that the finding that there would be a

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[5] Commercial deposits of sand and gravel, for example, are so numerous in Mississippi that even at present rail rates over 80 percent of the state can now be served with an economic truck haul. Tr. 661-663; Green Dep. 18-19; Exhs. 106-107. The 12 percent increase in intrastate rail rates authorized by the Interstate Commerce Commission would increase the economic truck operating radius enough to permit the entire state to be thus served. Green Dep. 18-19. Even the present rail rates on sand and gravel are negotiated rates, agreed to by the carriers and the shippers in 1949. All the witnesses agreed that these 1949 rates substantially reduced the existing scale for the purpose of meeting truck competition and holding sand and gravel traffic on the rails. Tr. 85-86, 235-236, 648-653, 658-659, 699-700. There is no evidence that the intensity of truck competition has decreased.

$550,000 increase in revenues from the increased rates was not supported by substantial evidence.

Again, the Statements as to Jurisdiction quote (No. 589, p. 15; similarly, No. 588, pp. 9-10), as a "further indication of the court's unwillingness to accept the Commission's findings of fact", an observation of the District Court that the Mississippi Commission was in a better position than the Interstate Commerce Commission to judge the effect of competition on the carriers. That the observation is correct cannot be, and indeed is not, denied. It is equally clear, moreover, that the implication which appellants seek to read into it—that the court was refusing to accept the findings of the Interstate Commerce even when supported by substantial evidence—is directly contrary to the position of the District Court if one reads the whole, and not merely a part, of the sentence in which the observation is made. Placed in proper context the statement reads as follows (124 F. Supp. at p. 816):

> "The record shows in this case that the Mississippi Commission was thoroughly familiar with the competition prevailing and with the location of the sites for gravel, the location of the highways and as a matter of fact, in better position to determine the effect of competition upon the carriers than is the Interstate Commerce Commission, but, *of course, its findings must yield to those of the Interstate Commerce Commission, if the record as a whole shows that there was substantial evidence.*" (Italics supplied.)

Certainly a reviewing court may properly accord to the decision and order of the Mississippi Public Service Commission, which is a part of the record, just as it does

to the report of a trial examiner, "such probative force as it intrinsically commands". See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 495.[6]

II

THE ALLEGED ERRORS OF LAW ARE WITHOUT SUBSTANCE

In addition to their request that this Court should re-evaluate the record in this case to determine whether the District Court has properly applied the rule of the *Universal Camera* case, the Statements as to Jurisdiction request that this Court correct certain alleged errors of law by the District Court. The points raised are at best peripheral rather than basic, and in any event the criticisms are wholly without substance.

Appellants contend (Statements, No. 588, pp. 8-9; No. 589, pp. 4, 17) that the lower court erred in "holding" that the evidence was legally insufficient because it did not show a separation of the railroads' revenues, expenses, and property values as between interstate and intrastate operations. The District Court made no such "holding". What it *did* do was simply to point out the indisputable fact that in determining whether

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[6] The same comment is equally applicable to the related criticism of the District Court (Statements as to Jurisdiction, No. 588, p. 9; No. 589, p. 16) in referring to the fact that the Mississippi Public Service Commission heard the case directly and not, as in the Interstate Commerce Commission, through an examiner. What the District Court said is admittedly correct, and we believe wholly unobjectionable (124 F. Supp. at p. 814): "The fixing of intrastate rates is primarily the duty of the state commission and the record in this case demonstrates that the Mississippi Commission gave great study and investigation and heard much testimony before the Commission itself and not through an examiner. If the evidence is substantial to support the finding of the Interstate Commission, then its power and its conclusions override that of the state commission, . . .".

there was substantial evidence to support the finding that the Mississippi intrastate rate was "abnormally low," it did not have such evidence before it. The opinion states (124 F. Supp. at p. 815):

> "There must be a finding based upon substantial evidence after a full investigation that the intrastate rates are abnormally low and that traffic thereunder fails to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The record does not bear out any substantial evidence to this effect. There was no separation made by the railroads of their revenues, expenses and properties as between interstate and intrastate operations. So far as the record shows, it could be fairly assumed that the rates fixed by the Mississippi Commission were not abnormally low but were bearing a fair percentage of revenue for the operation of the carriers. . . . There is no testimony in the record having probative force showing that the rates in Mississippi were abnormally low other than the disparity that exists between the interstate rates and the intrastate rates which within itself is not sufficient."[7]

Again, both Statements (No. 588, p. 8; No. 589, p. 18) seek to show a misconception of the law by the Dis-

[7] The carrier's own evidence showed that the present rates, instead of being "abnormally low", in fact produced an average per car revenue on sand and gravel, for example, 23.5 percent higher than the carriers system-wide average for that commodity. Compare Exh. 12 (system-wide, per car average $45.95), and Exh. 7 (Mississippi intrastate, per car average $56.74). The railroads' witnesses conceded that the average length of the interstate haul on these commodities is longer than the average 73 mile haul wholly inside Mississippi. Tr. 199, 203, 215, 219, 241.

trict Court by quoting an isolated statement in the opinion that in order to authorize the Commission to exercise its power to nullify intrastate rates under Section 13 (4) of the Act, it must show that injury to interstate shippers has resulted and will continue to result because of the disparity in rates. While it is true that in the sentences quoted by appellants the District Court inadvertently used a conjunctive rather than a disjunctive in spelling out the essential elements of a Commission order under Section 13 (4), it is clear beyond doubt that it *was* an inadvertence The opinion is crystal clear that the District Court knew that there were alternative grounds upon which the Commission might properly order an increase in intrastate rates, and that either would suffice. The court said (124 F. Supp. at p. 813):

> "Section 13 (4) prohibits two types of preference and discrimination, in respect to intrastate and interstate rail rates, preference and prejudice as to persons and localities, and discrimination against interstate commerce. The Commission report of November 2, 1953, found that no evidence was offered as to undue prejudice to interstate shippers. The remaining issue relates only to discrimination against interstate commerce."

There is not even a suggestion, anywhere in the opinion, that the conclusion of the District Court was based in the slightest degree upon a failure of the Commission to find injury to interstate shippers.

Finally, appellants urge (Statements, No. 588, p. 10; No. 589, pp. 18-20) that the District Court erred when it stated that the Interstate Commerce Commission improperly disregarded the evidence that passenger deficits were substantially lower in Mississippi than in

the South or the nation as a whole. That the Commission did in fact disregard the evidence—that it was in error in stating "There is no indication that the economies effected in Mississippi were relatively greater than on other portions of their lines", 291 I.C.C. 39, 63—requires an examination of the record, which we understand will be made in a Motion to Affirm to be filed by the Mississippi Public Service Commission. Suffice it here to say that the Commission's criticism of the evidence on this point as "a novel theory of rate-making" *(ibid.)* appears to be directly contrary to the teaching of *King* v. *United States,* 344 U.S. 254.[8] Indeed, it should be noted that the Commission's Statement as to Jurisdiction (No. 589, pp. 18-19) does *not* urge that the evidence can be disregarded on this ground; it insists only that the Commission did consider it.

III

THE AUTHORITIES CITED BY APPELLANTS IN FACT SUPPORT THE MOTION TO AFFIRM

As we have earlier pointed out, this Court, when requested to re-examine a long and complex record to determine whether administrative findings are supported by substantial evidence, will do so only in "the rare instances when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *Nation Labor Relations Board,* 340 U.S. at p. 491. That it has recently granted motions

[8] In the King case the Court stated that "there is no showing that the character of operating conditions in Florida intrastate passenger traffic differs substantially from that of interstate passenger operations in the southern territory generally." 344 U.S. at pp. 264-265. The inference from that and other statements in the opinion is that if passenger deficits in one state were substantially different from the general pattern, that fact would be relevant in determining intrastate freight rates.

to affirm lower court decisions upholding Commission orders is, therefore, no matter for surprise. *Tennessee* v. *United States,* 346 U.S. 891, rehearing denied, 346 U.S. 928; *Louisiana* v. *United States,* 348 U.S. 885, rehearing denied January 10, 1955, 348 U.S. —. Nor are such affirmances authority for appellants here; they demonstrate, rather, that the Court means precisely what it says when it refers to the "rare instances" when it may appropriately re-examine the lower court's conclusion.

Appellants, however, seek to make of the affirmance of the *Louisiana* case a pre-judgment on the instant case by referring to that case and the present one as "companion cases" and by asserting that the evidence in both cases was "substantially similar". In fact, the two cases are in no sense "companion cases"; neither the Mississippi Public Service Commission nor any of the shippers who are appellees here participated in any way in the Louisiana case, nor do they have any knowledge of the record therein. Moreover, there is no evidence in the record in this case that the conditions in Mississippi and Louisiana are similar in any respect, but, fortuitously, there *is* evidence that, for example, as to sand and gravel, conditions are vastly different. Since the transportation cost of sand and gravel far exceeds the actual sales price of the commodity itself,[9] an essential factor in deter-

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[9] Appellee American Sand & Gravel Company showed that its average selling price of sand and gravel was 70.3 cents per ton, and its average freight bill on present Mississippi intrastate rates was $1.11 per ton. Tr. 664-665. Although the railroads therefore already get 58 percent more revenue for the transportation of sand and gravel than the shipper gets for its sale, with the 12 percent increase authorized by the Interstate Commerce Commission the railroads would get 77 percent more than the shipper. *Ibid.*

mining whether to use rails or trucks to move sand and gravel is the length of the haul, which in turn depends upon the extent to which deposits are available near where sand and gravel is needed. Heyward Green, a sand and gravel operator who owns and operates plants in both Louisiana and Mississippi, testified (Dep. p. 30):

> "Q. You mentioned that you are confronted here, and you feel the railroads should face the problem which is local to Mississippi; by that do you mean the . . . numerous sand and gravel deposits, which makes for this truck competition?
>
> "A. Yes, sir; the other states are not geographically situated as Mississippi as to sand and gravel deposits; there are now large areas of Louisiana barren of sand and gravel deposits, and other states have a similar setup; . . . "

J. D. Lewis, likewise testified (Tr. 659): "Mississippi is different from many other States, in that there is an abundance of sand and gravel scattered over the State."

What appellants really urge is that once the Interstate Commerce Commission has determined that intrastate rates in one state should be increased under Section 13 (4), and that decision has successfully survived a challenge in the courts, the decision should be regarded as conclusive upon all other intrastate rates. If so, there has been a vast waste of time over many years, and Section 13 (4) has a meaning utterly different than that which anyone heretofore had imagined. We venture to think it will come as somewhat of a surprise to the Court to find it suggested that when it found the Louisiana case not to be one of the rare instances in

which a re-examination of the record was necessary, it was at the same time deciding that any court which thereafter held a Section 13 (4) order arising out of Ex Parte 175 to be unsupported by substantial evidence was due for a summary reversal.

A final word is perhaps warranted on *Northern Pacific Railway Co.* v. *Montana,* 344 U.S. 905, which the Commission urges as a precedent for summary reversal. The case has no resemblance whatever to the present one. There the District Court had found that the findings of the Interstate Commerce Commission were insufficient under the authority of *North Carolina* v. *United States,* 325 U.S. 507. While the appeal was pending, the Court handed down its decision in *King* v. *United States,* 344 U.S. 254, which put the *North Carolina* case in a new light. This Court thereupon reversed the District Court in the *Montana* case and remanded the proceeding "to the District Court for further proceedings in the light of *King* v. *United States,* decided this day". 344 U.S. 905. After remand the District Court sustained the order of the Interstate Commerce Commission, 117 F. Supp. 174, holding that the findings were adequate "in the light of *King* v. *United States*". Here there is no intervening decision and, as we have pointed out above, the court below gave full effect to the decisions of this Court. Here the problem is, essentially, only as to the substantiality of evidence to support the findings—an issue which is of no general significance but rather one which is unique on this record.

CONCLUSION

For the foregoing reasons, we submit that the decision of the District Court is correct and this appeal presents no substantial question. The judgment of the District Court should accordingly be affirmed.

Respectfully submitted,

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